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09/446,202	12/16/1999	BRIAN JOSEPH ROSELLE	6741	1967

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EXAMINER
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7-15

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Paper No. 15

Application Number: 09/446,202
Filing Date: December 16, 1999
Appellant(s): ROSELLE ET AL.

Jason J. Camp
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 6-14-02.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1-21 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,498,295	MURCH et al.	3-1996
5,849,678	MURCH et al.	12-1998

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-13, 15-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murch et al. (5,498,295).

Murch et al. disclose a method of treating food by contacting the food with a basic buffer which is sodium bicarbonate at a pH of not greater than 12.5 (col. 9, lines 6-20 and lines 34-39). The reference discloses that the formulation containing the sodium bicarbonate can in addition to being rinsed off, can be rubbed or wiped off (col. 11, lines 4-13). The reference discloses that the disinfectant is provided, but doesn't say how long the composition is to remain on the food product as in claims 1 and 2. As only the alkaline buffer is required in the claim, and it is known that sodium bicarbonate is food safe, then the composition would be safe for consumption. Therefore, as the composition contains food safe materials, it would have been obvious not to rinse off the composition before consumption.

Claims 2-6 further require particular amounts of the anionic detergent surfactant. The reference discloses the use of from 0.5% to about 15% C8-C18 fatty acid (col. 2, lines 60-65). Therefore, it would have been obvious to use within the claimed amounts.

Claim 7 further requires diluting the composition. As the ingredients are known, it is seen that it would have been within the skill of the ordinary worker to dilute to a particular amount. Therefore, it would have been obvious to dilute the claimed composition.

The limitations of 8-11 have been disclosed above. Claim 12 further requires from .1 to 50% detergent surfactant in a concentrated solution, which is shown by the reference in amounts from 0.5 to 15% (col. 12, lines 46-55). It would have been within

the skill of the ordinary worker to use amounts, which would have been food, safe if not washed off. The other ingredients are optional or have been disclosed above. Therefore, as the reference discloses amounts within the claimed range, it would have been obvious to use a food safe amount.

Claim 13 further requires a calcium sequestrant which is shown by the reference to be citric acid (col. 11, lines 10-25). Therefore, it would have been obvious to use known sequestrants in the claimed composition.

The further limitations of claims 15-21 are seen as obvious variations well within the skill of the ordinary worker to apply. Therefore, it would have been obvious to make the product a particular viscosity, and to use an antioxidant, and a suds suppresser and regular water in the claimed composition.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Murch '295 as applied to claims 1-13, 15-21 above, and further in view of Murch '678.

Claim 14 further requires a particular range of the pH of the buffer and a calcium ion sequestrant. The particular range of pH of the buffer is seen as within the skill of the ordinary worker, knowing that the product must be edible. Calcium sequestrants are disclosed by Murch et al. '678 (col. 8, as a GRAS item). Therefore, it would have been obvious to use known sequestrants such as EDTA in the claimed composition.

(11) Response to Argument

Appellants argue that Murch et al. do not show reducing the level of microorganisms on a surface of food for a particular length of time of more than one half

of a minute and that Murch et al. only disclose that its' compositions and processes can provide effective disinfectancy, but doesn't say how. This is not seen because Murch et al. disclose the claimed compound and says that it is for cleaning (abstract). Certainly, when one thinks of cleaning the surface of a food, one thinks that the product will be clean enough to eat, and certainly, this would have included reducing the level of microorganisms on the surface so that the product will be clean enough to eat. The composition of Murch et al. also is food safe (col. 4, lines 17-40). The details as to how the food is disinfected were that the food surface is contacted with the cleaning composition (col. 3, lines 50-59). As to the length of contact, the reference discloses that the composition can remove wax from apples (col. 5, lines 46-70). Nothing has been shown that this length of time is not at least 30 seconds or more, or than in doing this that the level of microbes would not have been reduced. In addition, the reference discloses another recognition of the importance of the removal of microbes in stating that they have a preservative strategy to reduce the growth of bacteria, fungi or molds at either a high pH (greater than 9) or low pH's and that in general basic pH compositions do not require a preservative (col. 9, lines 38-55).

Appellants argue that Murch et al. do not teach the importance of the pH in the reduction of the level of microorganisms on a food surface. This is not seen as Murch et al. disclose products with an alkaline pH. No particular levels of microbe reduction have been required, and nothing has been shown that the process of Murch et al. do not reduce the level of microbes.

Appellants argue that inherency should not be confused with obviousness and cite In re Robertson. However, if the process inherently removes microbes as would have been expected even and as taught by the term "cleaning", then removing microbes is inherent.

Appellants argue that obviousness cannot be based on what is unknown. Cleaning foods with detergents is known to make them cleaner. In this term is the idea that certainly anything harmful is washed away, i. e. as in washing hands after touching the nose, after gardening, etc. The reference has been shown to make products cleaner, and the reduction of microbes, which is what makes products unhealthy, is seen to have been encompassed in this term. Certainly, if dirt, etc. did not contain microbes such as the microbe causing botulism, there would be no need to wash dirt and debris off food.

Appellants argue that Murch et al. do not disclose dilute treatment solutions containing low levels of anionic surfactants as claimed, but that it uses anionic surfactants as optional materials. Murch et al. disclose the use of acid or base stable anionic surfactants, in as little amounts as 0.2% for dodecylbenzene sulfonate (col. 8, lines 48-56). Recognition of microbial growth is disclosed in col. 7, lines 18-20 where it says that the selection of non-nitrogen containing non-ionics can minimize the possibility of microbial growth in the dilute surfactant compositions. Claim 1 states that 0.5% to about 15% detergent surfactant can be used and does not limit the claim to any type of surfactant. The reference also recognizes that dilute solutions can be used as in col. 12, lines 10-45. The reference may not claim the use of an anionic surfactant but it

does disclose the use of one, making it obvious to use the anionic surfactant for its known function.

As to amounts with respect to claims 4, 5, 6, 10 and 11, these are seen to have been within the skill of the ordinary worker to use amounts, which would provide for a food safe product especially as the reference recognizes that the ingredients must be food safe. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a detergent product, properties such as food safety and cleaning ability are important. It appears that the precise ingredients as well as their proportions affect the food safety and cleaning ability of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.

In regard to the use of orthophosphate as in claim 12, the previous claims use alternatives to orthophosphate such as sodium bicarbonate. Claim 12 does not positively require an orthophosphate, but says "when present" (claim 12(b) line 3).

In regard to the use of particular calcium sequestrants as in claim 14, Murch et al. disclose that complex phosphates can be used (col. 8, lines 67-68) and Murch '678 disclose that EDTA can be used as a sequestrant (col. 8, lines 56-70).

In regard to claim 20, Appellants argue that Murch et al. do not teach the use of a toxicologically acceptable suds suppressor. However, Appellants' specification discloses on page 9, that suds suppressors are under "Optional Ingredients". The particular suds suppressors are disclosed as being made by Dow Corning and have

particular Dow numbers. This means that these products are commercial products, and nothing new is seen in their use for their known functions. (page 10, 2nd para.).

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

H. Pratt

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July 26, 2002

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